79-698

IN THE

Supreme Court of the United States

OCTOBER TERM

No. A-293

RICHARD W. BOTHMAN, as Chief Probation Officer, Santa Clara County Superior Court, Juvenile Division; ex rel, PHILLIP B., a minor,

Petitioner,

VS.

WARREN B. and PATRICIA B.,

Respondents.

Response to Petition for Writ of Certiorari to the Court of Appeal of the State of California, First Appellate District, Division Four

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Respondents pray that this Court deny the petition for Writ of Certiorari to review the decision of the Court of Appeal of the State of California, First Appellate District, Division Four, entered in the case of *"In re Phillip B.,* a person coming under the Juvenile Court Law," entered on May 8, 1979.

CITATION TO OPINIONS BELOW

The opinion of the Court of Appeal of the State of California, First Appellate District, Division Four, is reported at 92 Cal.App.3d 796; 156 Cal.Rptr. 48. The modification of the opinion upon denial of a petition for rehearing is reported at 93 Cal.App.3d 1010(1). The notification by the

Clerk of the California Supreme Court that a petition for hearing was denied is not reported. The opinion, modification and denial are each attached to the Petitioner's Petition for Writ of Certiorari.

JURISDICTION

Petitioner asserts that the jurisdiction of this Court is invoked under Title 28, United States Code, Section 1257(3).

STATEMENT OF ARGUMENT

I. THIS COURT SHOULD NOT REVIEW A STATE APPELLATE COURT DECISION ON THE PROPER STANDARD OF PROOF APPLICABLE IN A JUVENILE COURT HEARING WHEN THE STATE COURT SPECIFICALLY CONSIDERED AND REJECTED THE PETITIONER'S CONTENTION THAT THE INCORRECT STANDARD WAS APPLIED AND WHEN THE APPELLATE DECISION IS CONSISTENT WITH CURRENT STATE LAW.

II. THIS COURT SHOULD NOT CONSIDER THE EFFECT OF INTRODUCTION OF SO-CALLED "QUALITY OF LIFE" EVIDENCE AT THE JUVENILE COURT HEARING IN THIS CASE WHEN THE JUVENILE COURT CLEARLY BASED ITS DECISION UPON DIFFERENT GROUNDS, WHEN THAT EVIDENCE WAS NOT OBJECTED TO AT TRIAL, AND WAS NOT RAISED BY PETITIONER IN THE CALIFORNIA APPELLATE PROCEEDINGS.

STATUTE INVOLVED

This response concerns proceedings under California Welfare and Institutions Code Section 300(b) which is set forth in Appendix A.

INTRODUCTION

The central issue in this case is whether the State should intervene and override a family's medical decision relating to a non-emergency, somewhat risky, life-endangering operation for their retarded son. The Juvenile Court Judge found that there was insufficient evidence offered by the State to justify intervention and dismissed the petition.

STATEMENT OF FACTS AND PROCEEDINGS

Phillip Becker is a mentally retarded eleven year old boy suffering from Down's syndrome, also known as Mongolism (Reporter's Transcript at 6.) Phillip, like approximately 40 percent of the people with Down's syndrome, also suffers from a congenital heart defect—in his case, a ventricular septal defect that results in elevated pulmonary blood pressure (RT at 24.)

Mr. and Mrs. Warren Becker, Phillip's parents, learned of their son's Down's condition immediately after his birth (RT at 87.) After consulting with the physician who delivered Phillip as well as a representative of the county health department, the Beckers placed Phillip in a special home for retarded children (RT at 88, 104.) During Phillip's early years, the Beckers paid the full cost of Phillip's care (RT at 88.) When state funds became available, the Beckers began to share the cost of Phillip's care with the state and currently make regular monthly contributions (RT at 88-89.) When the operator of Phillip's first home retired, the Beckers placed their child in the care of another operator. After a relatively short period they determined he was not receiving adequate care and removed him to still another facility (RT at 89.) Since 1972 Phillip has resided at a nursery (now called Schnur's Nursery) for

retarded children in San Jose (RT at 75.) Phillip attends a special school for retarded children at the Rouleau Children's Center (RT at 62.)

Although they have reduced their visits with Phillip as they gained confidence in the care he was receiving at Schnur's Nursery (RT at 89), the parents still visit Phillip five or six times per year, and call frequently to check on his condition (RT at 110.) They keep up to date with school and medical reports and have been in attendance at his hospitalizations for dental surgery (RT at 90.)

In 1973, Dr. Gary Gathman, a pediatric cardiologist at the Valley Medical Center, diagnosed Phillip's heart defect and recommended a cardiac catheterization to determine the extent of the defect. The parents decided against catheterization (RT at 11.) At times since 1973 Phillip has received medication for his cardiac difficulties (RT at 11-12), however from 1973 to 1977 his health was good except for one attack of pneumonia which responded to treatment from antibiotics (RT at 12.)

In 1977 Dr. Gathman again saw Phillip, when he needed extensive dental work requiring general anesthesia. The anesthesiologist requested Dr. Gathman's opinion as to whether anesthesia was feasible for a patient with Phillip's heart defect (RT at 12-13.) Dr. Gathman again recommended catheterization to ensure that Phillip could receive anesthesia (RT at 13), and the Beckers consented (RT at 90.) On the basis of the catheterization, Dr. Gathman recommended to the Beckers that Phillip receive surgery to repair the lesion in his heart (RT at 21.) At the hearing he testified that although the mortality risk in this type of operation for a normal child is 1 percent, the risk for a Down's child is 3-5 percent (RT at 22.) He added that surgery poses the additional risk of damage to the nerve that controls heart pumping, damage which would require the insertion of a pacemaker to restore normal beating (RT at 30-31.) Dr. Gathman also stated that he does not recommend this type of surgery for retarded children suffering from intellectual incapacity so severe as to deny them the prospect of a reasonable quality of life (RT at 34-35), but felt that Phillip's mental capacity and future prospects warranted the operation (RT at 34.) He testified he did not know how long Phillip would live without the operation but predicted that Phillip's life span was likely to be an additional 20 years (RT at 16), and that as Phillip grew older he would experience pain and loss of energy (RT at 18.) Though the relatively short experience of modern medicine with cardiac surgery makes any predictions uncertain (RT at 29), Dr. Gathman speculated that with the operation Phillip's life might be prolonged (RT at 28.) The extent of a normal life span for a Down's child, however, is not known (RT at 29.)

A second pediatric cardiologist, Dr. William French of Stanford Medical Center, estimated the surgical mortality risk at 5-10 percent for the operation (RT at 42), and noted that Down's children face a higher than average risk of morbidity—post-operative complications. Noting the difficulty of precise predictions in this area, Dr. French stated that he thought the operation would increase Phillip's life span (RT at 43), and when consulted by Dr. Gathman, told him he considered the operation possible and the surgical risk reasonable. Nevertheless, Dr. French did not directly recommend to the parents that they consent to the surgery (RT at 44.) He stated that before he makes a recommendation, he normally engages in extended discussions

with the family and invokes the aid of other medical professionals and a social worker, because he believes such a decision involves a careful subjective weighing of personal and family as well as strictly medical factors (RT at 45-46, 55-56.) He noted that in at least one instance where he did recommend surgery to the parents of a Down's child with a congenital heart defect, the parents chose against surgery and Dr. French respected their decision (RT at 47.) He testified that all he ever offered parents was a recommendation since the parents ultimately make the decision.

A third physician, Dr. Henry Hartzell, a pediatrician at the Palo Alto Medical Clinic, submitted a letter in which he concurred in the Beckers' decision not to have the surgery performed, emphasizing the personal factors to be weighed in the decision along with the medical facts (Clerk's Transcript at 23-26.)

Seeking moral guidance and being Catholics, the Beckers consulted with a priest following their conference with Dr. Gathman (RT at 94) and, shortly before the hearing, with another priest, a Jesuit college Professor of Theology, whom they had known earlier during their residence in Kansas City (RT at 98-99.) The latter priest, after three discussions with the Beckers totaling ten hours, concurred in their decision not to have the surgery for Phillip. In a still further attempt to obtain guidance for their decision, Mrs. Becker attended an all-day seminar on Down's children and their medical problems at Stanford University (RT at 123.) The seminar was presented by doctors, nurses, and social workers (RT at 123.) Taking into account the available medical opinions (RT at 48, 96-97, 123), the consultations with family members (RT at 91, 112-113, 122-123), advice

from other parents of Down's children (RT at 91), religious counsel (RT at 98-99), their fears of Phillip's death from the operation (RT 109), and what they perceived would be Phillip's future (if he survived the operation) in the various institutions and facilities to which he would be moved as he grows older (RT 94, 104-107), the Beckers decided not to consent to the operation. They believed this decision would be in their son's best interests (RT at 94.)

Their chief concerns were 1) the risks inherent in the operation; 2) the lack of medical expert unanimity on the necessity of the operation; and 3) the danger that if Phillip's life expectancy is artificially extended, he would likely outlive them and therefore be without the guaranteed financial support or the supervision of his environment that only they can provide. In particular, the Beckers fear that if his life is extended by drastic medical means, Phillip will eventually be warehoused in the type of institution in which most older retarded people are forced to live (RT at 94-98, 122-24.)

In January of 1978, while the Beckers were making their decision, they learned from a supervisor at the County Mental Health Department that the state was planning to file a petition in juvenile court under § 300(b) of the Welfare and Institutions Code to declare Phillip a dependent child of the court (RT at 95.) The petition was filed on February 17, 1978, on the grounds that the Beckers' decision not to consent to the surgery constituted for Phillip a denial of the "necessities of life" and that Phillip should be declared a dependent child of the court for the special purpose of ensuring that he receive the cardiac surgery.

Hearing on the petition was held on April 27, 1978, and April 28, 1978, before the Honorable Eugene Premo. The court dismissed the petition to declare Phillip a dependent

child of the court because the state had failed to prove its case. Judge Premo stressed that the arguments and opinions marshalled in favor of surgery for Phillip involved subjective weighing of medical, social, and moral factors, and that the state could not override the judgment of the parents in weighing such factors themselves and acting in what they reasonably considered their child's best interests (RT at 153.)

The court did not rely upon the letter written by Dr. Hartzell and submitted by the Beckers. The court commented that since the writer of the letter did not testify, the court could not evaluate the contents of the letter (RT at 148.)

The court found that the proposed operation was not a life or death situation and classified it as an elective surgery (RT at 147.) The court was unimpressed with the medical testimony presented by the State and noted the fallibility of the medical profession in similar cases (RT at 148.) It found that the parents were neither negligent nor recalcitrant (RT at 149.) Instead the judge found that the Beckers had demonstrated intelligence, care and love and had devoted a great deal of thought on the subject matter (RT at 149.) The Judge concluded that the Beckers had fulfilled all of their legal and moral responsibilities as parents and that their decision was both carefully considered and properly arrived at (RT at 150-152.) Given the facts of the case, the court found that no one was in a better position to make the final decision whether to operate than the Beckers and that they had fulfilled their parental responsibilities completely (RT at 152.) The court concluded that no clear and convincing evidence was presented to sustain the petition (RT at 153.)

REASONS FOR DENYING THE WRIT

I. THIS COURT SHOULD NOT REVIEW A STATE APPELLATE COURT DECISION ON THE PROPER STANDARD OF PROOF APPLICABLE IN A JUVENILE COURT HEARING WHEN THE STATE COURT SPECIFICALLY CONSIDERED AND REJECTED THE PETITIONER'S CONTENTION THAT THE INCORRECT STANDARD WAS APPLIED AND WHEN THE APPELLATE DECISION IS CONSISTENT WITH CURRENT STATE LAW.

The Juvenile Court ruled that there was no "clear and convincing" evidence to sustain the petition urging state intervention to override the Beckers' decision not to have heart surgery for their son. The Court of Appeal for the State of California held that "clear and convincing" was the correct standard of proof and affirmed the Juvenile Court's order.

A brief review of the established principles of law in this area is in order. The settled state of both federal and California law is in accord with common sense, tradition, and biological instinct—that parental rights are not subject to state interference absent substantial cause. The privacy of family life, free from state intervention, is also a fundamental liberty protected by the Fourteenth Amendment. *Parham v. J. R.* (1979) ..... U.S. .....; 99 S.Ct. 2493; *United States v. Orito* (1973) 413 U.S. 139, 142; *Wisconsin v. Yoder* (1972) 406 U.S. 230, 235; *Stanley v. Illinois* (1972) 405 U.S. 645, 651; *Pierce v. Society of Sisters* (1925) 268 U.S. 510, 534-35; *Meyer v. Nebraska* (1923) 262 U.S. 390, 400-03.

Similarly, California courts recognize that a "dominant parental right" to control the lives of their children "pervades our law," and have given content to the dependency statute at issue here only by limiting its application to

"extreme cases of neglect, cruelty, or continuing exposure to immorality." See *In Re Raya* (1967) 255 Cal.App.2d 260 at 265, 63 Cal.Rptr. 252 (citing cases). The presumption is in favor of parental authority free from state interference. *County of Alameda v. Espinoza* (1966) 243 Cal.App.2d 534, 52 Cal.Rptr. 527. These presumptions of parental authority limit state intervention into parental decision-making only to those situations where there is a compelling state interest and proof of a substantial threshold of harm to the child likely to result from parental actions. See *Alsager v. District Court of Polk County,* 406 F.2d 10 (D. Iowa 1975).

In light of the foregoing the specific question raised herein can be addressed. The several states are free to adopt varying standards of proof in juvenile dependency proceedings subject only to these constitutional limitations. (*Addington v. Texas,* 441 U.S. 418; 99 S.Ct. 1804, 1812 (1979); moreover, the Supreme Court has no jurisdiction to correct a state court's interpretation of its own laws even if erroneous. *In re Murchison* (1955) 349 U.S. 133, 135. Petitioner concedes these points of law. In the instant case the juvenile court applied the proper standard of proof and the Court of Appeal, after carefully considering the question on appeal, decided it correctly under California law.

California courts have ruled that at least two different standards of proof are applicable to dependency proceedings depending on the type of case before the court. The applicable standard of proof depends upon the severity of the likely disposition that will follow a jurisdictional finding. In cases involving the temporary or permanent removal of a child from a parent, the "clear and convincing" standard of proof is required before the petition can be sustained and the intervention of the state permitted. *In re Robert P.* (1976) 61 Cal.App.3d 310, 318, 132 Cal.Rptr. 5, 10; *In re*

Terry D. (1978) 83 Cal.App.3d 890, 898; 148 Cal.Rptr. 221; See also *In re B.G.* (1974) 11 Cal.3d 679, 114 Cal.Rptr. 444, 523 P.2d 244. However, in cases involving a finding of dependency under Welfare and Institutions Code Section 300, but with no removal of a child from his parents' custody or termination of parental rights, the petitioner (the state) may prevail on "preponderance of evidence" test. *In re Lisa D.* (1978) 81 Cal.App.3d 192; 146 Cal.Rptr. 178; *In re Christopher B.* (1978) 82 Cal.App.3d 608; 147 Cal.Rptr. 390; *In re Nicole B.* (1979) 93 Cal.App.3d 874, 155 Cal. Rptr. 916.

The case of Phillip Becker is not directly on point with any of these cases, since it does not involve a "severance" of parental ties in the ordinary sense. The Juvenile Court Judge correctly looked past the technical jurisdictional question to the disposition—court-ordered life-endangering surgery for Phillip to remedy a non-life or death medical problem—which a finding of jurisdiction inevitably entailed. Such an order is far closer in its severity to the types of disposition for which precedent establishes the "clear and convincing" evidence test than to the mild dispositions in such cases as *Christopher B.,* (*supra*) and *Lisa D.* (*supra*) in which proof by preponderance was held sufficient.

Moreover, orders declaring a minor a dependent child of the juvenile court are subject in California to mandatory review within a calendar year at which time errors can be corrected or second thoughts by the state's officers given effect. California *Welfare and Institutions Code* Section 366 (Appendix B). But the order sought here is literally a "once in a lifetime" matter. The consequences of the surgery will be irremediable and they are ones with which Phillip and his parents will live forever—or his parents alone, should the child die on the operating table. Expressions of regret from the state, if such there be, will come too late. If any-

thing, proof beyond a reasonable doubt should be required, rather than clear and convincing evidence, before state action of such potentially disastrous proportions is permitted.

The Juvenile Court's specific findings as contained in its opinion further strengthen its conclusion. The court properly focused upon the operation itself, the parents' participation in the decision-making process, and the state's interest in intervening to override the parents' decision. Its findings as contained in its opinion included the following:

> First, the operation was not a life or death situation;
>
> Second, it was an elective surgery;
>
> Third, what would happen to Phillip without the operation was not known;
>
> Fifth, there was a 10% chance that Phillip would die during the operation, and a higher than average risk of morbidity;
>
> Sixth, the parents had done everything that society could possibly ask of them in order to arrive at an informed decision regarding the operation and what was best for their son;
>
> Seventh, no one else had spent the time and effort the parents had in reaching a decision about the operation; and
>
> Eighth, no one else had shown greater insight into the complexities of the decision than had the parents.

Put in simple basic terms, the court found that the parents must retain their rights to make decisions about their son unless compelling evidence is produced showing they have forfeited that right. This conclusion is consistent with decisions of the California Appellate courts, United States Supreme Court, and learned commentators.

Distinguished legal scholars have asserted that the state should limit its intervention in family medical matters to cases in which medical care is necessary to prevent the immediate death of the child or where its necessity for the best interests of the child is a matter of inarguable moral consensus.

> The state would overcome the presumption of parental autonomy in health-case matters only if it could establish: (a) that the medical profession is in agreement about what nonexperimental medical treatment is right for the child; (b) that the expected outcome of that treatment is what society agrees to be right for any child, a change for healthy growth toward adulthood or a life worth living; *and* (c) that the expected outcome of denial of that treatment would mean death for the child.
>
> Goldstein, Medical Care for the Child at Risk: On State Supervention of Parental Autonomy, 86 *Yale L.J.* 645, 652 (1977).

The record in the trial court reveals that the Juvenile Court Judge would have been justified in finding *none* of these factors in the present case. The three sources of medical testimony were not in full agreement about the risks of the operation. The operation was not necessary to prevent imminent death; medical witnesses could at best speculate that it might extend Phillip's life span beyond a point 20 years in the future, and noted in fact that it might end his life abruptly on the operating table. Finally, the Judge found that the parents' decision not to consent was based on a complex of subjective factors on which there was no clear moral agreement in our society, and which even the medical witnesses recommending the surgery recognized

were inevitable elements in their own conclusions concerning Phillip's case.

It is this final factor that most clearly refutes the claim of the petitioner that the issue at bar is whether a child can be denied "necessities of life" based on arbitrary parental notions of "quality of life." Professor Goldstein asserts that where a proposed operation is unnecessary to prevent imminent death the state can intervene only if the parents' refusal violates common law notions of "plain duty," for the meaning of which he cites Justice Field:

> The duty omitted must be a plain duty, by which I mean that it must be one that does not admit of any discussion as to its obligatory force; one upon which different minds must agree, or will generally agree. Where doubt exists as to what conduct should be pursued in a particular case, and intelligent men differ as to the proper action [the law cannot intervene].
>
> *United States v. Knowles,* 26 F.Cas. 800, 801 (N.D. Cal. 1864) (no. 15, 540). (quoted in Goldstein, *supra,* at 853-54).

Professor Goldstein concludes:

> There can thus be no societal consensus about the "rightness" of always deciding for "life," or of always preferring the predicted result of the recommended treatment over the predicted result of refusing such treatment.
>
> Goldstein, *supra,* at 854.

Parents therefore fulfill their duty in a situation where medical intervention is not necessary to prevent imminent death when they make a reasoned and sincere decision involving subjective factors about which society has no

fixed view. Similarly Professor Michael Wald of Stanford University has noted that in most "medical neglect" cases the party requesting intervention does not represent the "best interests of the child" as objectively defined, but merely another point of view on the issue, and that among competing views of the child's interest the parents' must prevail. Wald, *State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards,* 27 *Stan.L.Rev.* 985 (1975). In the same vein, Goldstein notes: "As *parens patriae* the state is too crude an instrument to become an adequate substitute for the parents . . . . there is no basis for assuming that the judgments of its decision-makers about a particular child's needs would be any better than (or indeed as good as) the judgments of his parents." *Goldstein, supra,* at 650. See also Bennett, *Allocation of Child Medical Care Decision-Making Authority: A Suggested Interest Analysis,* 62 Va.L.Rev. 285, 308 (1976) cited in *Parham v. J.R.,* ..... U.S. ....., 99 S.Ct. 2493 at 2505 (1979).

II. THIS COURT SHOULD NOT CONSIDER THE EFFECT OF INTRODUCTION OF SO-CALLED "QUALITY OF LIFE" EVIDENCE AT THE JUVENILE COURT HEARING IN THIS CASE WHEN THE JUVENILE COURT CLEARLY BASED ITS DECISION UPON DIFFERENT GROUNDS, WHEN THAT EVIDENCE WAS NOT OBJECTED TO AT TRIAL, AND WAS NOT RAISED BY PETITIONER IN THE CALIFORNIA APPELLATE PROCEEDINGS.

The Beckers testified at great length about the time and effort they expended trying to decide whether to permit the operation for their son. They consulted a number of friends,

advisors and professionals before making their decision. A great number of reasons for not permitting the operation were considered including the risk of the operation, its necessity, and their son's future, all with an overriding concern—Phillip's best interests.

The Juvenile Court in its decision found that the operation was an elective one, and not a life or death choice. The Court was clearly unimpressed by the force of the medical testimony offered by the state. It pointed to the possible death to the minor in such surgery. Given the choice of whether to operate in such circumstances the Court could not second guess the parents whom it found neither negligent nor recalcitrant.

The Court did not rely upon the evidence concerning so-called "quality of life" considerations. It specifically noted that it could not evaluate the letter from Dr. Hartzell since the Court had no opportunity to question the doctor. Further the Court pointed to the fallibility of the medical profession in similar cases, stressing that a great deal of medical testimony would be necessary to satisfy the court. It was not "quality of life" testimony, but the lack of persuasive evidence presented by the state that doomed the state's case.

Even if this court were to speculate that "quality of life" evidence was considered by the Juvenile Court, it is clear that such consideration would not improperly taint the proceedings. In non-jury trials, which in California includes juvenile court dependency hearings, it is presumed that the trial judge disregarded any inadmissible evidence and relied upon competent evidence. See McCormack, *Evidence,* West, St. Paul (1954), at 137 and citations therein; *People v. Williams* (1965) 239 Cal.App.2d 42, 48 Cal.Rptr. 421; *People v. Garcia* (1965) 239 Cal.App.2d 58, 58 Cal.Rptr.

305. See also *In re Guardianship of Marino* (1973) 30 Cal. App.3d 952, 106 Cal. Rptr. 655.

In any proceeding objection must be made to the admission of improper evidence in order to obtain appellate review, *Shain v. Peterson* (1893) 99 Cal. 486, 33 P. 1085; *Cummings v. Cummings* (1929) 97 Cal.App. 144, 149, 275 P. 245; Witkin, *California Evidence,* § 1285 at p. 1188 (Bancroft-Whitney, 1966); Witkin, *California Procedure* (2d Ed. 1971) p. 4260. Further, for this Court to consider a specific federal question, it must have been raised or drawn in question in the state courts. *Anonymous Nos. 6 & 7 v. Baker,* 360 U.S. 287; *Honeyman v. Honeyman,* 300 U.S. 14. This issue is raised by petitioner for the first time here.

In sum, even if this court decides to consider an issue not raised at trial or in the state appellate courts, the record reveals that the judge did not rely upon any "quality of life" evidence in rendering his decision and instead based his conclusions upon the insufficiency of the state's evidence.

CONCLUSION

For the reasons stated the petition for Writ of Certiorari should be denied.

DATED: February 20, 1980

LEONARD P. EDWARDS
Attorney for Respondent

(Appendices follow)

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Appendix B

WELFARE AND INISTITUTIONS CODE

366. Subsequent review. Every hearing in which an order is made adjudging a minor a dependent child of the juvenile court pursuant to Section 300 and every subsequent hearing in which such an order is made, except a hearing at which the court orders the termination of its jurisdiction over such minor, shall be continued to a specific future date not more than one year after the date of such order. The continued hearing shall be placed on the appearance calendar and the probation officer shall make an investigation, file a supplemental report and make his recommendation for disposition. The court shall advise all persons present of the date of the future hearing and of their right to be present, to be represented by counsel and to show cause, if they have cause, why the jurisdiction of the court over the minor should be terminated. Notice of hearing shall be mailed by the probation officer to the same persons as in an original proceeding and to counsel of record by certified mail addressed to the last known address of the person to be notified, or shall be personally served on such persons, not earlier than 30 days preceding the date to which the hearing was continued.